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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 173

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWE A. STIDGER, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 50–57) is reported at 40 T.C. 896. The opinion of the court of appeals (R. 62–73) is reported at 355 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1965 (R. 74). By orders of Mr. Justice Douglas, entered on March 29 and April 25, 1966, the time for filing the petition for a writ of certiorari was extended to May 26, 1966 (R. 75, 76). The petition was filed on May 25, 1966, and was granted on October 10, 1966 (R. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether amounts expended for meals by a military officer stationed at a permanent duty post to which he is prohibited from bringing his family constitute deductible "traveling expenses * * * [incurred] while away from home" or nondeductible "personal [or] living" expenses, under the pertinent provisions of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

* * * * * *

SEC. 262. PERSONAL, LIVING AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

Respondent[1] was during 1957 and 1958 a Captain in the United States Marine Corps. For approx-

[1] Mrs. Stidger is a party solely because a joint return was filed for 1958.

imately two and one-half years preceding October, 1957, he had been attached to a Marine Air Squadron stationed at El Toro, California. During this period he lived with his family in nearby Santa Ana. (R. 51.)

On October 1, 1957, respondent, together with his squadron, was assigned to a new permanent duty station in the Far East for 15 months. On that date, he departed from El Toro, California, for Iwakuni, Japan. Dependents of Marine Air personnel were prohibited by Marine Corps orders from accompanying such personnel to Iwakuni. (R. 15–16, 26.) During respondent's 15-month tour of duty abroad, his family continued to reside in Santa Ana, California (R. 51). While respondent was stationed at Iwakuni, the Marine Corps furnished him free quarters (R. 16). Like all commissioned officers, he was, however, required to pay for his own meals which were available at the post's officers' mess for approximately $65 per month (R. 41, 52).[1] During the period respondent was in Japan, he continued to receive $102.50 a month as a tax-free quarters allowance for his family and approximately $42.50 a month tax-free allowance for his subsistence.[2] In December, 1958, respondent was assigned to a new permanent duty station at the

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[1] Respondent was reimbursed for the cost of his meals by means of a per diem allowance for 49 of the days he was away from Iwakuni on official business during 1958; he does not claim any deduction for meals on these days (R. 16, 37, 42).

[2] Respondent was actually entitled by law to a monthly subsistence allowance of $47.88. Act of May 19, 1952, c. 310, 66 Stat. 90, § 1 (37 U.S.C. 1958 ed., § 251). The record does not show why he received only $42.50.

Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962. (R. 16, 45, 53.)

On his 1958 income tax return, respondent deducted the $650 he had spent for meals at Iwakuni, Japan computed on the basis of $65 per month for ten months. The Commissioner disallowed the deduction. The Tax Court found that respondent's stay at Iwakuni was "not temporary" and that during 1958 his "home" within the meaning of § 162(a)(2) of the Internal Revenue Code of 1954 was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling * * * away from home." (R. 50–57.)

The court of appeals, one judge dissenting, reversed the Tax Court on the ground that respondent's "home" was his family residence in California, and that he was thus "away from home" while stationed at Iwakuni (R. 62–73).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the question whether a Marine Officer who was stationed at Iwakuni, Japan, away from his family for a period of approximately 15 months, and who received a tax-free subsistence allowance for meals, may deduct the cost of his meals at the officers' mess as "travel expenses * * * while away from home" under § 162(a)(2) of the 1954 Code. Although this case involves only the definition of the "home" of a military officer, the answer to that question requires an examination of the basic congressional purpose in permitting the deduction of "traveling expenses * * * while away from home in the pursuit

of a trade or business." In order to put the question in this case in its proper context, we shall therefore first discuss the general question of the meaning of "home" under § 162(a)(2), and then deal with the application of this concept to military personnel.

It is the Commissioner's position that a deduction is improper because the respondent was not away from his "home" as that word is used in § 162(a)(2). Over the past 45 years, the Commissioner has consistently construed "home" in § 162 as the taxpayer's principal post of duty or employment, which in this case was Iwakuni, Japan. This long-standing interpretation of the statute has been approved by the great majority of courts considering the question and implicitly by Congress through re-enactment in identical language of the travel expense provision in all internal revenue statutes from 1921 to 1954. Moreover, the Congressional debates in connection with a 1952 amendment to § 162 make it clear that Congress was aware of the Commissioner's interpretation of "home." Instead of altering the Commissioner's well-accepted construction of § 162, Congress in 1952 created a limited exception to the general rule in order to permit Congressmen to deduct part of their expenses of living in Washington.

The Commissioner's interpretation is an eminently reasonable one, which effectively and fairly serves to draw the line between deductible business expenses under Code § 162 and nondeductible "personal, living, or family expenses" under § 262. It clearly represents an appropriate exercise of the Commissioner's rule-making power.

Although for purposes of § 162 a taxpayer's principal place of business ordinarily is his home, the Commissioner, with the approval of the courts, has recognized a limited exception to this general rule where the taxpayer's stay at a particular business post is only "temporary." As the Tax Court found, respondent was not at Iwakuni for a temporary period. The Commissioner has ruled that where a taxpayer expects to remain at a post for 12 months or more, his stay is generally not temporary. The record shows that respondent expected to be, and was, in the Far East for approximately 15 months, and his stay was thus not temporary.

The well-established interpretation of "home" in § 162 is especially appropriate for military personnel. Indeed, whether or not a taxpayer's more-than-temporary place of business or employment is considered his home under § 162(a)(2) for taxpayers in all circumstances, the facts of military life require the conclusion that a military officer's place of permanent duty is his home in the everyday sense of the word. Typically, a serviceman's permanent military post is the place where he engages in normal living activities. It is the place where he eats, sleeps, works and engages in recreation. He uses post facilities for education, worship and similar activities associated with home. In a real sense, the military post is his home.

Furthermore, to construe a serviceman's home as other than his permanent duty post and consequently to permit him to deduct the cost of his meals as travel expenses would distort the basic purpose of § 162(a)(2) and give respondent and similarly situated serv-

icemen advantages not available to other taxpayers. The travel expense deduction of § 162 is intended to alleviate the financial burden on a taxpayer who normally incurs additional living expenses when traveling on business. The average business traveler who is away from his family incurs duplicate lodging costs when he stays in hotels and higher food costs when he eats in restaurants. Military officers, like respondent, on the other hand, are provided with free lodging and given a tax-free subsistence allowance with which to purchase food which is provided by the military at low cost. Since an officer does not bear the substantial additional costs usually associated with travel, granting him a deduction for his normal living expenses would be contrary to the policy of § 262 which makes the normal living expenses of any taxpayer nondeductible. Moreover, if he is given a deduction for the cost of his food which has been reimbursed in whole or in large part by a tax-free subsistence allowance, he would also receive a wholly unwarranted windfall. This inequitable result can and should be avoided by treating a serviceman's permanent post of duty as his home within the meaning of Code § 162.

ARGUMENT

I

A TAXPAYER'S "HOME" FOR PURPOSES OF § 162(a)(2) OF THE 1954 CODE IS HIS PRINCIPAL PLACE OF BUSINESS OR EMPLOYMENT

1. In all internal revenue statutes beginning with the Revenue Act of 1921 down to § 162 of the 1954 Code,

Congress in identical language has granted a deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."[4] As this Court noted in *Commissioner* v. *Flowers*, 326 U.S. 465, 471, the Treasury Department's administrative rulings, dating from 1921, have consistently treated the statutory word "home" as meaning a taxpayer's principal place of business or employment, *i.e.*, the locality where a taxpayer is principally assigned to work, not the locality where he maintains his residence (although usually the two will be the same).[5] Thus, for a period of forty-five years the Commissioner has consistently held that a taxpayer is generally entitled to the travel expense deduction only when he is away from his regular work. Moreover,

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[4] Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 214(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162, *supra*, p. 2.

[5] See, *e.g.*, O.D. 864, 4 Cum. Bull. 211 (1921); O.D. 1021, 5 Cum. Bull. 174 (1921); I.T. 1264, I-1 Cum. Bull. 122 (1922); I.T. 1355, I-1 Cum. Bull. 194 (1922); I.T. 1380, I-2 Cum. Bull. 88 (1923); I.T. 1404, I-2 Cum. Bull 145 (1922); G.C.M. 4956, VII-2 Cum. Bull. 128 (1928); I.T. 3514, 1939-2 Cum. Bull. 152; G.C.M. 23672, 1943 Cum. Bull. 66; I.T. 3842, 1947-1 Cum. Bull. 11; Rev. Rul. 54-147, 1954-1 Cum. Bull. 51; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul 55-236, 1955-1 Cum. Bull. 274; Rev. Rul. 56-49, 1956-1 Cum. Bull. 152; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60.

the Tax Court, since 1927, has consistently followed this administrative interpretation in a wide variety of factual situations.[6]

Likewise, except for the Ninth and possibly the Fifth and Sixth Circuits,[7] all the courts of appeals

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[6] See *e.g.*, *Bixler* v. *Commissioner*, 5 B.T.A. 1181; *Duncan* v. *Commissioner*, 17 B.T.A. 1088, affirmed *per curiam*, 47 F. 2d 1082 (C.A. 2); *Lindsay* v. *Commissioner*, 34 B.T.A. 840; *Priddy* v. *Commissioner*, 43 B.T.A. 18, petition for review dismissed July 23, 1941 (C.A. 5); *Gustafson* v. *Commissioner*, 3 T.C. 998; *Tyler* v. *Commissioner*, 13 T.C. 186; *Carroll* v. *Commissioner*, 20 T.C. 382; *Garlock* v. *Commissioner*, 34 T.C. 611; *Green* v. *Commissioner*, 35 T.C. 764, affirmed *per curiam*, 298 F. 2d 890 (C.A. 6); *Friedman* v. *Commissioner*, 37 T.C. 539 (1961); *Lipps* v. *Commissioner*, decided March 26, 1962 (21 T.C.M. 358); *Capps* v. *Commissioner*, decided March 23, 1964 (23 T.C.M. 482).

[7] As this Court noted in the *Flowers* case, *supra*, p. 472, the Ninth Circuit in *Wallace* v. *Commissioner*, 144 F. 2d 407, rejected the view that the word "home" as used in the statute is equivalent to the taxpayer's post of duty and instead confined the term to the taxpayer's actual residence. However, in that case the taxpayer was away for a temporary period, and should have been entitled to a deduction under the Commissioner's exception to the general rule for temporary absences, discussed *infra*. Thus, *Wallace* is not inconsistent with the Commissioner's interpretation of the statute. In *Harvey* v. *Commissioner*, 283 F. 2d 491 (C.A. 9), the next case which arose in the Ninth Circuit involving the meaning of home, the court seemed to accept the Commissioner's definition. Subsequently, however, in *Wright* v. *Hartsell*, 305 F. 2d 221 (C.A. 9), and the instant case, it has returned to the definition of home set forth in *Wallace* without a reconsideration of that case in the light of the Commissioner's present interpretation of the statute.

The Fifth Circuit, it seems, has generally agreed with the Ninth Circuit's interpretation (see *Flowers* v. *Commissioner*, 148 F. 2d 165 (C.A. 5), reversed on other grounds, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C.A. 5); *United States* v. *LeBlanc*, 278 F. 2d 571–572 (C.A. 5)), but

that have decided the question[4] have approved the Commissioner's interpretation of "home." In *O'Toole* v. *Commissioner*, 243 F. 2d 302, 303, for instance, the Second Circuit flatly stated that "'home' as used in the statute means the taxpayer's principal place of business or employment." See also *Martin* v. *Commissioner*, 295 F. 2d 38 (C.A. 3), affirming per curiam 19 T.C.M. 1216 (decided October 11, 1960); *Coerver* v. *Commissioner*, 297 F. 2d 837 (C.A. 3), affirming *per curiam* 36 T.C. 252; *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C.A. 4); *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C.A. 4); *England* v. *United States*, 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986; *Ney* v. *United States*, 171 F. 2d 449 (C.A. 8), certiorari denied, 336 U.S. 967; *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); and *York* v. *Commissioner*, 160 F. 2d 385 (C.A. D.C.).

In *Commissioner* v. *Flowers*, *supra*, at p. 465, this Court upheld another aspect of the Commissioner's long-standing position on traveling expenses. The Court there stated that where the Commissioner had over a long period of years consistently interpreted what is now § 162(a)(2) to exclude any deduction for commuting expenses, his interpretation would be "deemed to possess implied legislative approval and to have the effect of law. *Helvering* v. *Winmill*, 305

in the light of its decision in *Olaunch* v. *Commissioner*, 264 F. 2d 309 (C.A. 5), its exact position on the problem appears unclear. Likewise, in view of its later action in *Green* v. *Commissioner*, 298 F. 2d 890 (C.A. 6), the Sixth Circuit's apparent alignment in *Burns* v. *Gray*, 287 F. 2d 698 (C.A. 6), with the interpretation of the Ninth Circuit seems to be in doubt.

[4] The First Circuit does not appear to have taken a position in this matter.

U.S. 79; *Boehm* v. *Commissioner*, 326 U.S. 287." The same rationale applies in the instant case.

In fact, the Treasury's definition of "home" was brought forcefully to the attention of Congress in 1952, and Congress at that time apparently accepted the Commissioner's long-standing interpretation. Prior to 1952, it was well established, since at least 1936, that members of Congress could not deduct, as business traveling expenses, the cost of meals and lodging while in Washington. *Lindsay* v. *Commissioner*, 34 B.T.A. 840. Since Washington is the principal post of duty of a member of Congress, it is, under the settled rule, his "home" for tax purposes, even though his family residence is located in the district he represents. In 1952, Congress specifically amended § 162's predecessor to provide that a Congressman's "home" is his residence in the district he represents, and that he would be allowed a deduction of up to $3,000 for his living expenses in Washington. Legislative Branch Appropriation Act, 1953, c. 598, 66 Stat. 464; now 1954 Code § 162(a) (last paragraph). The debates in Congress on this amendment show that Congress was aware of the Commissioner's construction of the word "home" for purposes of § 162(a)(2). 98 Cong. Record, Part 4, 5280, Part 5, 8282. Congress dealt with the problem by providing a specific deduction for a congressman's living expenses in Washington. Thus, it would appear that Congress accepted the Commissioner's interpretation of the statute under which, without such a specific exception, a congressman could not deduct his living expenses because Washington, as his principal place of duty, was his "home."

2. The Treasury Department's interpretation of § 162(a)(2) is a sound one which reasonably and fairly coordinates that section with § 262 of the 1954 Code. Section 262 prohibits the deduction of "personal, living, or family expenses" which generally would include the cost of meals and lodging.[9] Prior to 1921, the internal revenue laws contained no specific provision relating to travel expenses. The Income Tax Act of 1913 permitted deductions only for those "necessary expenses actually paid in carrying on any business, not including personal, living, or family expense."[10] In interpreting this provision the Commissioner initially permitted the deduction only of transportation costs, *excluding* food and lodging, since the latter were considered personal living expenses.[11]

This latter regulation was unfair to the taxpayer who was required to travel for business reasons, since it failed to recognize that in traveling a taxpayer normally incurs additional living expenses. The cost of his lodging, while traveling, usually duplicates the amount he is already paying for housing, and the

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[9] In *Flowers*, *supra*, at 469, this Court specifically pointed out that § 162(a)(2)'s predecessor (§ 23(a)(1)(A) of the 1939 Code) "is to be contrasted with" § 262's precursor (§ 24(a)(1) of the 1939 Code).

[10] Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, Section IIB; substantially the same provision appeared in the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 5, and the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sections 214 and 215.

[11] Treasury Regulations 45 (1919 ed.), Article 292. This regulation also provided that taxpayers who received a traveling allowance for meals and lodging must include as income only the excess of the allowance over the actual expenses incurred, thereby favoring those taxpayers whose expenses were reimbursed.

cost of his food in restaurants is likely to be greater than the cost of his food when living with his family. Consequently, the Commissioner amended the regulation one year later to permit the deduction of reasonable expenses for meals and lodging on a business trip in excess of any expenditures ordinarily required for such purposes.[12]

The regulation, as amended, was both logically sound and equitable. It recognized that the excess amount which a taxpayer is required to pay for food and lodging when away on a business trip is a cost of earning income. Since the income tax is imposed on net income, it is proper to permit an ordinary business deduction for the additional cost of food and lodging incurred only because of the business trip. The deduction also placed the traveling businessman on the same tax footing as the non-traveling businessman. Neither was entitled to deduct his usual living costs; only the excess above the normal level was deductible as a business expense.

The regulation, however, proved administratively "too cumbersome a procedure," and at the suggestion of the Treasury Department,[13] the Revenue Act of 1921 permitted a deduction for "traveling expenses (including *the entire amount* expended for meals and

[12] T.D. 3101, 3 Cum. Bull. 191 (1920). The new regulation also required taxpayers to include as income any allowance received as a reimbursement for living expenses and consequently eliminated the discrimination noted in fn. 11, *supra*.

[13] Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 2 and 13, 1921 (Confidential Committee Print, subsequently released for publication), pp. 50, 234–235.

lodging) while away from home in the pursuit of a trade or business" (emphasis supplied)." The Treasury Department's proposal—which Congress accepted—was based on the reasonable assumption that a taxpayer who travels on business will ordinarily incur greater living expenses than normal, and that although only the additional living expenses caused by travel should properly be deductible as business expenses, the burden on the taxpayer of establishing those extra costs and on the Internal Revenue Service in auditing them is too great to justify permitting only the lesser deduction. Consequently, since 1921 the internal revenue laws have permitted the deduction of traveling expenses, including the entire amount expended for meals and lodging, although this gives the business traveler a somewhat larger deduction than he is entitled to—*i.e.*, it allows him to deduct both the amount he would have spent on meals if he had remained at "home" as well as the excess incurred because of the business trip.

The Commissioner immediately took steps to insure that the deduction would not be abused. He adopted the administrative position (consistently maintained throughout the last 45 years) that the deduction is allowable only when the taxpayer is temporarily traveling on business away from his principal post of duty or employment. It is clear that the deduction for business traveling expenses was intended to provide relief to a taxpayer whose trade or business requires him to travel temporarily or intermittently away from the locality which is his regular place of business or employment. Stated dif-

[14] Revenue Act of 1921, c. 136, 42 Stat. 227, § 214.

ferently, § 162(a)(2) is intended to ameliorate the financial hardship on the taxpayer who incurs unreimbursed additional living expenses when traveling away from his regular location on business, and to place him, insofar as it is practicable, for tax purposes on a parity with the "stay-at-home" taxpayer. Were a taxpayer permitted to deduct his normal expenses for meals and lodging at the locality of his regular place of business, the mandate of § 262—forbidding the deduction of personal expenses—would be frustrated; for obviously all taxpayers engaged in trade or business must incur such living and personal expenses, wherever they may keep their living headquarters. Cf. *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C.A. 8). In the light of the history of § 162, the Treasury Department's interpretation of "home" as a taxpayer's principal place of business or employment for longer than a temporary period effectuates the purpose and intent of Congress in a fair and reasonable manner.

Moreover, this interpretation and its application to individual cases represents an appropriate exercise of the Commissioner's rule-making powers in an area that has serious administrative problems. There is an inherent difficulty in drawing a line between personal living expenses that are proximately related to business and those living expenses that have too remote a relationship to business activity to qualify as deductible business expenses. In order to avoid the uncertainty of a case-by-case approach, the Commissioner has exercised his power to draw a line between the two types of expenses by defining a taxpayer's "home" as his principal place of business or employ-

ment"[15]—an interpretation which implements the objective of § 162(a)(2) and results in a reasonable and equitable accommodation of that section to § 262.

3. The interpretation of "home" adopted by the court of appeals in this case would inevitably require the difficult case-by-case approach that the Commissioner's rule was designed to avoid. The Ninth Circuit would permit a taxpayer to deduct his living expenses while away from his residence on business unless "it [is] reasonable to expect the taxpayer to move his residence to his place of employment" (R. 68). Applying such a test may be easy in the unusual case presented here where the taxpayer was forbidden by military orders to bring his family with him. In the overwhelming number of cases it is likely to be extremely difficult. The Commissioner and the courts would have to consider a large number of complex factors, such as the adequacy of housing at the new post, the expense of moving, the schooling requirements of the taxpayer's children, the climate at the taxpayer's new business post, the health of the taxpayer's wife and children, and the need to care for elderly or ailing relatives. The Commissioner and the courts are ill suited to making determinations of this nature. Ascertaining and evaluating the relevant factors and deciding whether it is reasonable for a particular taxpayer to move his residence would not only present a great administrative burden but would also threaten the uniform application of tax laws because of the vagaries inherent in such a concept of reasonableness. The Commissioner's construction of home in § 162(a)(2) avoids these pitfalls.

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[15] Cf. *England* v. *United States*, 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986, involving the deductibility of business-related moving expenses.

II

A MILITARY OFFICER'S "HOME" FOR PURPOSES OF § 162 IS HIS PERMANENT DUTY POST

1. Under the long-standing definition of a taxpayer's home for purposes of § 162 as his more-than-temporary post of duty or employment, respondent was not traveling away from home while stationed at Iwakuni. From the time he was transferred to Iwakuni he knew that his stay in the Far East would be approximately 15 months, and that during this period his family could not accompany him (R. 15–16, 38). He was in fact stationed at Iwakuni for 14½ months. Thus under the meaning of "home" discussed in Point I, respondent's "home" was Iwakuni because it was his permanent duty station.

As this Court noted in *Peurifoy* v. *Commissioner*, 358 U.S. 59, 60, the Commissioner and the courts have engrafted an exception upon the general rule that a taxpayer's principal place of business or employment is his home. Under this exception, a taxpayer who is employed *temporarily* at a particular place on business is regarded as "traveling * * * away from home."[16] This exception is based on the theory

[16] E.g., *Schurer* v. *Commissioner*, 3 T.C. 544; *Bark* v. *Commissioner*, 6 T.C. 851; *Leach* v. *Commissioner*, 12 T.C. 20; *Loden* v. *Commissioner*, decided January 31, 1956 (15 T.C.M. 134); *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.A. 2); *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); G.C.M. 10915, 1932-2 Cum. Bull. 245; G.C.M. 23672, 1943 Cum. Bull. 66; Rev. Rul. 190, 1953-2 Cum. Bull. 303; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60; Rev. Rul. 60-314, 1960-2 Cum. Bull. 48.

that it is inequitable to call a taxpayer's temporary place of employment his "home," since he must, as a practical matter, maintain a residence elsewhere. On the other hand, if a taxpayer's employment is indefinite or indeterminate rather than temporary, he is not "traveling * * * while away from home." The Commissioner has ruled, in general, that a taxpayer's employment is more than temporary if his "actual or anticipated" stay is "a year or more." Rev. Rul. 60–189, 1960–1 Cum. Bull. 60, 63.

Whether a taxpayer's post of duty is temporary within the scope of this ruling, presents a factual issue. *Peurifoy* v. *Commissioner, supra* at 60–61. Here the Tax Court correctly concluded that (R. 55):

> Although petitioner's tour of duty in the Far East was for a period of approximately 15 months, we do not think it can be said to be a temporary assignment. While 15 months may have lacked real permanence, "the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses." *Floyd Garlock,* 34 T.C. 611, 616. Cf. *Beatrice H. Albert, supra.* We have found as an ultimate fact that petitioner's stay in the Far East was not temporary.

The court of appeals found it unnecessary to review this finding. The record shows, however, that respondent was sent to, and expected to remain at, Iwakuni for approximately 15 months (R. 38). Thus, he does not come within the exception permitting the

deduction of expenses incurred at a temporary place of employment.

2. Even if a taxpayer's more-than-temporary place of business or employment were not considered to be his home under § 162(a)(2) in all circumstances, the facts of military life require that a serviceman's permanent duty post be treated as his "home". In the case of a serviceman, like respondent, this post will inevitably be the community in which his professional and personal activities are focused and will be his "home" in the ordinary everyday sense of that word.

At the outset, the typical pattern of military life, which sets the serviceman apart from the ordinary taxpayer, must be recognized. Military life demands discipline and regimentation not required in other occupations. Perforce, a serviceman must allow his government employer to regulate his life and provide for his needs to a degree unparalleled in civilian life. Furthermore, military service also requires frequent changes of duty posts. Especially since World War II, our global defense responsibilities have required the shifting of American servicemen from military post to military post throughout the world. Since frequent transfers are a constant factor of military life, the military post plays a part in the serviceman's life quite unlike that the office or employment headquarters may have for the civilian. It is clear that in the context of military life it is reasonable to treat the serviceman's permanent duty station as his "home" for tax purposes.

Of course, the serviceman, especially when he is stationed away from his family, may not view his military post as his home in a sentimental way. He may well consider as his "home town" the place where his family lives, his last civilian residence, or the place where he hopes to settle when he completes his military service. Yet, despite emotional ties to other locations, the serviceman's permanent military post is his home in the sense that it is the community in which his day-to-day professional and personal activities are focused. Ordinarily he will eat at a post mess, sleep in barracks or a bachelor officer's quarters on the post, and work on or near the post. A serviceman receives his medical attention at the post dispensary, purchases a large part of his personal needs at the post commissary or PX, patronizes the post laundry and barber shop, and uses the post athletic facilities. He is entertained at the post theater and in the enlisted men's or officers' clubs which are on the post. He frequently attends church at the post chapel and classes in post educational facilities. In short, when a serviceman is permanently assigned to a military post like Iwakuni, it constitutes the community in which his professional and personal activities occur. It thus accords with the realities of everyday service life to regard the post as his home.

Moreover, as we have shown (*supra*, pp. 12–14), § 162 is designed to permit a taxpayer to deduct what would otherwise be nondeductible personal expenses when he incurs significant additional living expenses as a cost of earning income. Such a deduction reduces the financial burden which a taxpayer must bear when he travels on business. In the case of servicemen, how-

ever, Congress and the military have already lessened or eliminated any financial burden which might result from changes of duty posts and family separations. The government provides a system of tax-free benefits and allowances more appropriate to the serviceman's special situation than would be an expense account plan or a deduction under § 162. This unique arrangement is facilitated, of course, by the fact that the serviceman works for and pays taxes to the same entity. Congress and the military services have endeavored to insure that a serviceman will not incur the significant additional living expenses usually associated with business travel, by giving him tax exempt allowances to cover most or all of such expenses. If a serviceman also were given a deduction for his ordinary living expenses at his principal duty station, he would receive an unwarranted tax windfall that would conflict with the purposes of §§ 162 and 262, which in combination forbid the deduction of normal living expenses.

The system of allowances and benefits provided by Congress and the military assures that a serviceman's basic living requirements are provided without significant financial burden to himself whatever his marital state and wherever he is stationed. For instance, the enlisted man who is unmarried or living apart from his family receives his food and lodging in kind without charge. The married enlisted man living with his family will usually receive a tax-free quarters allowance [17] and tax-free allowance equal to

[17] 37 U.S.C. 403. The Government may supply quarters to him and his family in lieu of the allowance. 37 U.S.C. 403(b).

the commuted value of the food he would have received in kind.[18] Thus the married enlisted man who receives a tax-free allowance to buy his food and lodging is in approximately the same position as the enlisted man who receives his food and lodging in kind. Since both receive food and lodging tax free, both are in a better position than the civilian who must pay his living expenses from his net income after taxes. This system also ensures that the enlisted man who is separated from his family will not incur additional living expenses. He will receive his food and lodging in kind and will continue to receive either housing for his dependents or a tax-free allowance for their housing.

The lodging requirements of an officer are provided in the same basic way as are the enlisted man's. The officer either receives his quarters in kind without charge or receives a tax-free allowance in lieu thereof.[19] In the event an officer is sent to a permanent post where dependents may not accompany him, he will receive either quarters in kind, as respondent did, or a tax-free quarters allowance in addition to the tax-free quarters allowance he continues to receive for his family.[20] Thus, whatever his marital status and wherever he is stationed, an officer receives quarters without cost to himself and tax free, and is in a posi-

[18] 37 U.S.C. 402. Career enlisted men who live with their families are ordinarily granted permission to eat separately from other enlisted men. In 1963 there were about 800,000 members who received $1.03 per day as a commuted ration. Report of Committee on Armed Services, on Military Pay Increase, H. Rep. No. 208, 88th Cong., 1st Sess., p. 22.

[19] 37 U.S.C. 403.

[20] 37 U.S.C. 403, 427.

tion quite unlike the businessman whose lodging costs will increase when he is away from his family.

Instead of supplying food in kind to officers, Congress has provided each officer with a tax-free subsistence allowance of $47.88 per month, which is intended to cover the cost of his meals at the officer's mess.[21] As the Hook Commission,[22] which designed the basic framework of the present military pay system, stated:

> The theory behind the subsistence allowance is that since the officer is required to arrange and provide his subsistence at all times and since he has no choice as to the place where he is to be stationed and therefore does not have the choice of the average citizen as to the place and manner of subsisting himself, it is necessary to provide him with an allowance at all

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[21] 37 U.S.C. 402; Advisory Commission on Service Pay, Career Compensation for the Uniformed Services, p. 11 (1948) (see fn. 22).

Where an officer cannot possibly exercise any choice with regard to his food, as for example when he is assigned to a hospital or is serving in the field, the cost of his food may be deducted directly from his subsistence allowance. Army Regulation 30-41 (10 Dec. 1965); Navy Comptroller Manual, Section 044025 (26 Jan. 1966); *Morriss* v. *United States*, 139 F. Supp. 767 (Ct. Cl.).

[22] Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces, Appendix, p. 17 (1948). This body, otherwise known as the Hook Commission, was appointed by the Secretary of Defense in 1947 to make a thorough review of the pay structure and scales of the Armed Forces. The Commission submitted a report in December, 1948. The Commission's recommendations were adopted in large part in the Career Compensation Act of 1949, c. 681, 63 Stat. 812, § 301. See Report of Committee on Armed Services, H. Rept. No. 779, 81st Cong., 1st Sess., p. 2.

times so that he may bear that expense wherever stationed.

With respect to the amount of such a subsistence allowance, the Hook Commission stated: "The appropriate guide for this determination * * * is the amount equivalent to defray the cost to the individual of the officer's mess, since, normally, an officer would subsist himself in this fashion."[23] An Army officer, for example, may obtain his meals at the post officers' mess for $1.60 per day, or $48 per thirty-day month, almost the exact amount of his monthly subsistence allowance of $47.88.[24] Thus an Army officer, no matter where he is stationed, can obtain his food for substantially the amount of his subsistence allowance. As we have already pointed out, he is also provided free lodging by the military. Therefore, an Army officer, even when he is permanently assigned to a post apart from his wife and family, will not incur any expenses beyond those he would have incurred had his family accompanied him.

In this respect the serviceman is in a position analogous to the taxpayer in *James* v. *United States*, 308 F. 2d 204 (C.A. 9). In that case the question was whether a traveling salesman, who was constantly on the road, was entitled to deduct his living expenses as "traveling expenses * * * while away from home." The salesman claimed one of the towns he visited regularly, Reno, Nevada, as his home. Although he had no permanent apartment or other living accommodations in Reno, it was there that he maintained his post office

[23] Advisory Commission, *supra*, p. 11.

[24] Army Regulation 30-30, paragraph 2 (21 April 1966).

box and bank account, dealt with his stockbroker, stored his personal belongings, and attended to those personal affairs which he neglected while on the road. The Ninth Circuit in *James* denied the claimed §162(a)(2) deduction because the taxpayer there incurred no duplicated expenses. Since he had no substantial expenses at his purported "home," he incurred only one set of living expenses—when he was on the road. The court recognized that allowing a deduction in such circumstances would not effectuate the purpose of the travel expense provision of the Code but would, contrary to §262, give the taxpayer the unwarranted advantage of deducting his ordinary living expenses.

For the same reason a military officer should be denied a deduction for his meals. The military system of tax-free allowances, low cost meals, and free lodging eliminates any substantial duplication of expenses at his permanent post of duty. Thus his only unreimbursed expenses are those of his family, which any taxpayer is required to bear without a tax deduction as "personal, living, or family expenses." 1954 Code §262.

Indeed, until the instant decision, there was little room for doubt that a serviceman's permanent duty post was his home for purposes of §162, even though he was separated from his family. In *Bercaw* v. *Commissioner*, 165 F. 2d 521, the Fourth Circuit held that an officer whose permanent station was at Fort Meade, Maryland, could not deduct his meal and janitorial expenses as "traveling expenses * * * while away from home" although he was living away from his

family. Relying on the Commissioner's long-standing interpretation of home as well on the special allowance given a military officer, the court state (at 524):

> * * * whenever [the serviceman] * * * made a permanent change of station that place of duty becomes his place of business and there is his "home". * * *. Thus the expenditures for meals and striker service while at this post were personal living expenses and nondeductible. * * *.

The Commissioner has reiterated this position in Rev. Rul. 55-571, 1955-2 Cum. Bull. 44, which states that:

> * * * members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them.[25]

Respondent received the same tax-free subsistence allowance with which to purchase his food that all

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[25] When a serviceman is temporarily away from his permanent duty post he is permitted to deduct his living expenses. Therefore, a naval officer may deduct his meals while aboard ship at sea but not while at his home base. Rev. Rul. 55-571, *supra*. Civilians who were called up for temporary military service during the "Berlin crisis" were permitted to deduct the costs of meals and lodging in excess of their quarters and subsistence allowance because their military assignment was expected to be of temporary duration. Rev. Rul.

military officers received. While the Army provides meals at a price almost exactly equal to the military subsistence allowance, the prices at a Marine officers' mess vary from post to post, according to the quantity and quality of the food selected by the particular mess in question.[26] Thus, while respondent received $42 per month tax-free subsistence allowance,[27] his mess bills were $65 per month. But the fact that the charge for meals at the Iwakuni mess was higher than the regular subsistence allowance received by respondent was not attributable to the fact that he was stationed overseas. It was the result of the happenstance that the particular mess at which he was eating undertook to provide a higher quality and greater variety of food than was obtainable for the regular charge. The higher charge might have been similarly incurred at a mess in El Toro, California, or a lower charge might have been applicable at another post in Japan to which respondent might have been assigned. Thus, the fact that respondent's allowance

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63–64, 1963–1 Cum. Bull. 30; see also Rev. Rul. 60–189, 1960–1 Cum. Bull. 60. Apparently this latter ruling was in recognition of the fact that "citizen" soldiers would probably bear additional costs of maintaining their civilian homes when they were called up on temporary military duty. Of course, these rulings do not justify a deduction for respondent since the Tax Court found his assignment was not temporary. See also Rev. Rul. 60–189, 1960–1 Cum. Bull. 60.

[26] Meal prices at Marine Officers' Messes are set by each mess to cover the net cost of food sold. Marine Corps Manual, Paragraph 4010 (20 July 1966).

[27] See *supra*, p. 3, n. 3.

did not cover the full cost of his meals in Japan [28] does not justify a departure from the long standing rule that a soldier's permanent post of duty is his "home" for purposes of § 162."

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[28] To the extent that the subsistence allowance is inadequate to meet an officer's food costs, this appears to be a matter for Congress to correct by increasing subsistence allowances to all officers rather than by giving relief to a limited group through the tax laws. The last increase in the subsistence allowance was in 1952 when it was increased 14 percent. Act of May 19, 1952, c. 310, 66 Stat. 80. The Military Pay Act of 1963 as passed by the House contained a provision increasing the subsistence allowance by 6.6 percent. H.R. 5555, 88th Cong., 1st Sess., Sec. 9. This provision was deleted by the Senate at the request of the Department of Defense, which was studying the whole system of subsistence allowances. 109 Cong. Record, Part 11, p. 14205. The Eighty-ninth Congress took no action on H.R. 1026, a bill to increase the subsistence allowance to $75 per month.

[29] In addition to providing for the serviceman's direct living expenses for food and lodging when he is away from his family, Congress has made special provision for his dependents when military service forces family separation. Even though the serviceman is away, he continues to receive, as we have pointed out above, a tax-free allowance for his family's lodging. 37 U.S.C. 403. Recognizing that the family may reduce its expenses by living with relatives, the government will also pay the transportation and moving expenses of the serviceman's family to any point in the United States. 37 U.S.C. 406; Joint Travel Regulations, Ch. 7. Finally, since 1963 Congress has provided for a monthly allowance of $30 per month when a serviceman is separated from his family for more than 30 days. 37 U.S.C. 427, because it recognized that the absence of the head of the family may cause extra household expenses. H. Rep. No. 208, 88th Cong., 1st Sess., p. 28.

If, moreover, the Commissioner's interpretation of § 162(a)(2) is not accepted, the result will be a wholly unwarranted tax windfall for a particular group of military officers. An officer's subsistence allowance, which is intended to reimburse him for the cost of his meals, is also excluded from his gross income and is thus tax exempt. Regulations on Income Tax (1954 Code) § 1.61-2(b); Mim. 3413, V-I Cum. Bull. 29 (1926); *Jones* v. *United States*, 60 Ct. Cl. 552. On the other hand, when a civilian travels for his employer and receives an expense allowance to reimburse him for his expenses of meals and lodging, the amount of the reimbursement is included in his income. Rev. Rul. 190, 1953-2 Cum. Bull. 303; *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); *Courtney* v. *Commissioner*, 32 T.C. 334. In order to make the reimbursement tax free, the businessman is allowed to deduct his traveling expenses for meals and lodging to offset the taxable reimbursement. Since the military officer's subsistence allowance is already excluded from his income, to permit him also to deduct the expenses that the tax-exempt allowance was intended to offset would give him a windfall. Cf. 1954 Code § 265. For example, if a military officer *who is living with his family* on or near his duty post earns $6,000 salary and receives a $575 tax-free subsistence allowance which he spends on meals, his taxable income will be $6,000. If the same military officer is assigned to a permanent duty station *to which he cannot take his family* and he receives, in addition to his $6,000 salary, the same $575 tax-free meal allowance which he spends on food, his taxable income should also be

$6,000. But if the Commissioner's position is rejected in this case, the latter's taxable income would be only $5,425 ($6,000 less a $575 deduction for meals "while away from home * * * [on] business").

In summary, we submit that the Commissioner's consistent position over 45 years that a taxpayer's principal place of business or employment is his "home" within the meaning of § 162(a)(2) has been incorporated into law by repeated congressional reenactment of the travel expense statute. As we have demonstrated (*supra*, p. 11), Congress was aware of the Commissioner's position, which has been accepted by the Tax Court since 1927 and by the great majority of the courts of appeals. This rule is particularly appropriate where the taxpayer is a military officer stationed at a permanent duty post.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JACK S. LEVIN,
Assistant to the Solicitor General.
ROBERT N. ANDERSON,
ALBERT J. BEVERIDGE III,
Attorneys.

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